OG Heights Management Corp v One Aug Land Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22–544 OF 2007
PRASAD ABRAHAM J
8 FEBRUARY 2012

Civil Procedure — Parties — Proper parties to be sued, whether — Whether plaintiff cited proper defendants to be sued — Whether plaintiff had sustainable claim against third and fourth defendants

Tort — Negligence — Adjoining properties — Construction works caused damage to adjoining property — Breach of duty of care — Whether defendants taken reasonable and prudent steps when carrying out development works — Whether breach proven — Whether defendants liable for negligence

Tort — Nuisance — Interference with personal use of land — Mandatory orders — Plaintiff sought order for removal of structures within 5ft of its land — Whether order sought mandatory in nature — Whether order should be granted — Whether matter ought to have been referred to planning authorities rather than courts

The second defendant was at all material times the owner of two plots of land ('the defendant's properties'), which adjoined the plaintiff's property on its northern boundary, while the first defendant was the developer of the second defendant's properties. The third defendant was a contractor engaged by the first defendant sometime in June 2005 to carry out construction activities on the second defendant's properties and the fourth defendant was a director of the first and third defendants. The plaintiff was concerned about the construction works undertaken by the defendants on the second defendant's properties, which were located on a slope more than 10 meters higher than the plaintiff's property. The plaintiff's complaint was that the activities of the defendants on the second defendants' properties had caused landslips to occur on the plaintiff's land on 25 December 2005 and 7 January 2006. The plaintiff commenced an action against the defendants for nuisance, negligence and/or trespass. The issues to be determined in this case were whether the plaintiff had cited the proper defendants to be sued; whether the landslips complained of by the plaintiff could be linked to the defendants' activities on the second defendants' properties; and whether the defendants were liable in negligence to the plaintiff.

Held, dismissing the plaintiff's claim with costs:

(1) As the law maintains that the creator of the nuisance would be liable for

nuisance, the plaintiff could only maintain a claim against the first and second defendants. The third defendant was merely an independent contractor, while the fourth defendant was a director of the first and third defendants. As such, the third and fourth defendants were not the proper parties in a claim for nuisance, negligence or trespass and the plaintiff's claim against them was dismissed with costs (see para 2).

(2) The tort of nuisance is not actionable per se and the plaintiff would have to prove that there was the likelihood of damage to its land because of the commencement of development works on the second defendant's properties. This court found that there had been no clear evidence to causally link the landslips complained of by the plaintiff to the activities of the defendants on their land. Further, landslips on the plaintiff's land had taken place well before the defendants commenced the clearing of the land and the slope between the adjoining lands (see paras 23–24 & 28).

(3) As a general rule the second defendant was entitled to build on its own lands subject to our system of planning controls. In the circumstances, this court found that the plaintiff's complaints would have been best resolved by referring the matter to the appropriate planning authorities rather than via a court action for nuisance (see paras 25 & 27).

(4) As for the plea of negligence, there was insufficient evidence to suggest that the development on the adjoining property was the primary cause for the landslips experienced by the plaintiff on its land. In any case, the defendants had taken reasonable and prudent steps in carrying out the development works on the adjoining properties and thus had not breached their duty of care (see para 29).

(5) The costs of the remedial measures to be adopted as recommended by the experts advising the parties ought to be borne equally by both parties. The plaintiff must accept the reality of the adjoining development albeit on a hill slope causing a certain amount of interference on its land. The court thus ordered the remedial measures as specified by the experts to be undertaken at a cost not exceeding RM250,000 (see paras 31 & 36(b)).

(6) The plaintiff sought a mandatory order to cause the cantilevered structures found within 5 ft of the plaintiff's property to be removed. This court found that the granting of such an order would not produce a fair result in that the benefit to be gained by the plaintiff would outweigh the detriment caused to the defendant (see paras 32–33).

(7) The issue of trespass on a portion of the plaintiff's land was no longer an issue as the defendants had conceded the fact of trespass. The question of damages was referred to the *timbalan pendaftar* for assessment (see para 36(d)).

[Bahasa Malaysia summary

Defendan kedua pada setiap masa matan adalah pemilik dua keping tanah ('hartanah defendan'), yang bersebelahan dengan hartanah plaintif di sempadan sebelah utara, manakala defendan pertama adalah pemaju untuk hartanah defendan kedua. Defendan ketiga adalah kontraktor yang dilantik oleh defendan pertama sekitar Jun 2005 untuk menjalankan kegiatan pembinaan atas hartanah defendan kedua dan defendan keempat adalah pengarah defendan-defendan pertama dan ketiga. Plaintif khuatir tentang kerja-kerja pembinaan yang dijalankan oleh defendan-defendan ke atas hartanah defendan, yang terletak di lereng yang lebih tinggi 10 meter daripada harta plaintif. Aduan plaintif adalah mengenai kegiatan defendan-defendan ke atas hartanah defendan kedua yang telah menyebabkan tanah runtuh berlaku ke atas tanah plaintif pada 25 Disember 2005 dan 7 Januari 2006. Plaintif telah memulakan tindakan terhadap defendan-defendan kerana kacau ganggu, kecuaian dan/atau pencerobohan. Isu-isu yang perlu ditentukan dalam kes ini adalah sama ada plaintif menamakan defendan-defendan yang betul untuk disaman; sama ada tanah runtuh yang diadu oleh plaintif mungkin berkait dengan kegiatan defendan-defendan atas hartanah defendan kedua; dan sama ada defendan-defendan bertanggungjawab kerana kecuaian terhadap plaintif.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Oleh kerana undang-undang menetapkan bahawa pembuat kacau ganggu adalah bertanggungjawab kerana kacau ganggu itu, plaintif hanya boleh mengekalkan satu tuntutan terhadap defendan-defendan pertama dan kedua. Defendan ketiga hanya kontraktor berasingan, manakala defendan keempat adalah pengarah defendan-defendan pertama dan ketiga. Oleh itu, defendan-defendan ketiga dan keempat bukan pihak-pihak yang betul dalam tuntutan untuk kacau ganggu, kecuaian atau pencerobohan dan tuntutan plaintif terhadap mereka adalah ditolak dengan kos (lihat perenggan 2).

(2) Tort berhubung kacau ganggu tidak boleh diambil tindakan itu sendiri dan plaintif perlu membuktikan terdapat kemungkinan kerosakan atas tanahnya kerana kerja-kerja pembangunan yang dimulakan ke atas hartanah defendan kedua. Mahkamah ini mendapati bahawa tiada bukti jelas yang boleh mengaitkan tanah runtuh yang diadu oleh plaintif dengan kegiatan defendan-defendan atas tanah mereka. Selain itu, tanah runtuh ke atas tanah plaintif telah berlaku sebelum defendan-defendan mula menerangkan tanah tersebut dan cerun antara tanah bersebelahan itu (lihat perenggan 23–24 & 28).

(3) Sebagai rukun am defendan kedua berhak untuk membina atas tanahnya sendiri tertakluk kepada sistem rancangan kawalan. Dalam keadaan tersebut, mahkamah ini mendapati bahawa aduan plaintif paling sesuai

diselesaikan dengan merujuk perkara tersebut kepada pihak berkuasa perancangan dan bukan melalui tindakan mahkamah kerana kacau ganggu (lihat perenggan 25 & 27).

(4) Berhubung pli kecuaian, keterangan tidak mencukupi untuk mencadangkan bahawa pembangunan ke atas hartanah bersebelahan adalah sebab utama tanah runtuh yang dialami oleh plaintif ke atas tanahnya. Dalam apa keadaan, defendan-defendan telah mengambil langkah-langkah munasabah dan wajar dalam menjalankan kerja-kerja pembangunan atas hartanah bersebelahan dan dengan itu tidak melanggar kewajipan berjaga-jaga mereka (lihat perenggan 29).

(5) Kos langkah-langkah untuk remedi yang diguna pakai seperti mana disarankan oleh pakar yang menasihati pihak-pihak patut ditanggung sama rata oleh kedua-dua pihak. Plaintif perlu menerima realiti pembangunan bersebelahan di atas cerun bukit telah menyebabkan berlaku pergerakan tanah. Mahkamah dengan itu memerintahkan langkah-langkah remedi seperti mana ditetapkan oleh pakar dilaksanakan dengan kos tidak melebihi RM250,000 (lihat perenggan 31 & 36(b)).

(6) Plaintif telah memohon perintah mandatori untuk menyebabkan struktur yang dipacak sedalam 5 kaki atas hartanah plaintif dialihkan. Mahkamah ini mendapati bahawa dengan membenarkan perintah tersebut bukan keputusan adil yang mana faedah diperoleh oleh plaintif melebihi kerugian yang disebabkan ke atas defendan (lihat perenggan 32–33).

(7) Isu pencerobohan ke atas sebahagian tanah plaintiff bukanlah lagi menjadi isu kerana defendan telah mengakui hakikat pencerobohan. Soalan kerosakan telah dirujuk kepada timbalan pendaftar untuk taksiran (lihat perenggan 36(d)).]

Notes

For cases on adjoining properties, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 929–945.

For cases on nuisance in general, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1809–1856.

For cases on whether proper parties to be sued, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5711–5719.

Cases referred to

Bridlington Relay Ltd v Yorkshire Electricity Board [1965] 1 Ch 436, Ch D (refd)

Chastey v Ackland [1895] 2 Ch 398, CA (refd)

Hunter and others v Canary Wharf Ltd [1997] 2 WLR 684, HL (refd)

Leong Bee & Co v Ling Nam Rubber Works [1970] 2 MLJ 45, PC (refd)

Marcic v Thames Water Utilities Ltd [2002] 2 All ER 55; [2002] EWCA Civ 64, CA (refd)
Shepherd Homes Ltd v Sandham [1971] Ch 340, Ch D (refd)
Tay Tuan Kiat & Anor v Pritam Singh Brar [1987] 1 MLJ 276, HC (refd)
Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1, FC (refd)

Legislation referred to

Strata Titles Act 1985

Balbir Singh (Wan Balbir & Assoc) for the plaintiff.
HW Wong (KS Ong & Co) for the defendants.

Prasad Abraham J:

[1] This case was heard by this court over a period of days and the trial was finally completed. Thereafter parties were directed to put in written submissions, and the court now delivers judgment in respect of this matter. The court apologies to parties and to counsel for the delay in the delivery of this judgment, and record its appreciation to counsel for their efforts in their research and as a consequence, their assistance to court.

[2] The case involves the law of nuisance, negligence and the law of trespass. Before I proceed to deal with the facts of the case, I first would deal with the question of the proper parties before the court namely whether the proper the defendants had been cited. There is no doubt the plaintiff has a proprietary interest in the land to maintain this action. The question to be asked is who can be sued? The law maintains the source and the creator of the interference will be liable for nuisance. He who authorises the impugned activity from which the interference is foreseeable would be liable and should be the defendant. Looking at the defendants in this case, it is my view that the plaintiff's claim is only sustainable against the first and second defendants, as the third defendant was merely an independent contractor, and the fourth defendant a director of the first and third defendants. I therefore rule the claim of the plaintiff against the third and fourth defendants is dismissed with costs as they are not the proper parties in a claim for nuisance and/or negligence and or trespass.

(See the case of *Marcic v Thames Water Utilities Ltd* [2002] 2 All ER 55; [2002] EWCA Civ 64 at p 85 and see also *Law of Torts in Malaysia* (3rd Ed), Norchaya Talib at pp 353–354).

UNDISPUTED FACTS

[3] The plaintiff is the registered owner of the property held under Geran No 13700, Lot No 34105 Mukim Petaling, Wilayah Persekutuan and is the

management corporation incorporated under the Strata Titles Act 1985 (Act 318) and is empowered to bring this action under the said Act.

[4] The second defendants is the owner of the property held under Geran No 6723 Lot No 10122 and Geran No 6724 Lot No 10123 Mukim Petaling, Daerah Kuala Lumpur.

[5] The first defendant is the developer of the second defendant's properties.

[6] The third defendants is a contractor and its shares are owned by the second and fourth defendants. The second and fourth defendants are directors of the first and third defendants and were engaged in the day to day construction activities conducted on the second defendants' land.

[7] The defendants' properties adjoins the plaintiff's property on its northern boundary. It is on a slope of more than 10 meters higher than the plaintiff's property ('the slope').

[8] One of the pre-requisites underlying the approval from DBKL to the defendants prior to commencing the ground works was to build a reinforced concrete wall with the required bearing capacity to restrain the soil. The approval given by DBKL through their letter dated 29 April 2005 refers to *Kelulusan Pelan Kerja Tanah* and subjected to certain conditions as stated in para 6 as follows:

> Walaupun kelulusan telah diperolehi oleh pihak tuan, pihak tuan adalah bertanggungjawab terhadap *hakisan tanah, pemendakan kelodak* dan *kerosakan yang akan terjadi kepada harta benda bersebelahan,* jalan-jalan, saliran air dan sebagainya akibat daripada kerja tanah yang dicadangkan (refer pp 1–4 bundle B) attached to the submission.

[9] The third defendants is alleged to have commenced work on the second defendant's properties sometimes in the latter half of 2005.

[10] The plaintiff was concerned about the manner the defendants were undertaking the project because the defendants were clearing the slope of all vegetation without taking any precautionary measures to prevent the soil from washing onto the plaintiff's property and affecting the stability of the slope between both properties. The plaintiff was also concerned that the third defendants would by their employees and agents encroach onto the plaintiff's property.

[11] On the morning of the 25 December 2005, a landslide occurred as a result of the site clearing and pre piling works the defendants were undertaking

(as claimed by the plaintiff), and destroyed the retaining wall (which was a reinforced concrete structure with steel bars) inside the plaintiff's property. Earth from the landslide blocked the drains and caused one of the two ramps in Ruby Tower car park which served the residents of the plaintiff's condominiums to be closed.

[12] The plaintiff called for a meeting with the fourth defendant which was held on the 31 December 2005.

[13] A further landslide occurred on 7 January 2006, which further aggravated the situation causing more rubble and debris to fall onto the plaintiff's property.

[14] The defendants claim that the landslide was caused by the plaintiff's but agreed that the retaining wall that was destroyed by the landslide was rebuilt by the defendants.

P: Do you agree that you rebuilt it?

DW1: Yes.

[15] On or about the 12 January 2006 the third defendants then gave the plaintiff a sketch plan purportedly done by its engineer on its proposed solution (refer pp 66–67 bundle B).

[16] The plaintiff requested for further details by its letter dated 16 January 2006. To date, no response has been received (refer p 40 bundle B). The defendants had also not disclosed its approvals for the development.

[17] The third defendants' letter dated 12 January 2006 proposed for a gabion wall ie a wire netting cage filled with rocks to be erected and placed at the boundary of the properties. The plaintiff was not agreeable to this method as this technique of stabilising the slope using a gabion wall was a short term solution. The average life span of a gabion wall is only five years and up to a maximum 25 years whereas the building and structures on the slope it supports is designed to last 125 years. This information was extended to the plaintiff by the Institute of Engineers Malaysia in an article entitled 'Retaining Walls and Why They Sometimes Fails'. It states that gabion walls are temporary structures (refer pp 107–110 bundle B) attached hereto.

[18] The plaintiff caused its solicitors Messrs Yap Hussin Loke & Loh to issue a letter dated 18 January 2006 to the first defendants requesting for documents, approved plans and to repair the damage (refer pp 95–97 bundle B).

[19] The plaintiff received no response so; the plaintiff then requested the assistance of its Member of Parliament, YB Teresa Kok. Upon her intervention, DBKL responded by sending one of its engineers, one Ir Tham Kok Seng to attend a meeting on 15 February 2006 which was attended by the second and fourth defendants. At the meeting, the plaintiff learnt that the defendant had not submitted a plan for the slope works earlier and had done so only two days before ie 13 February 2006 and when the third defendant started work and piling on the slope, they had not yet submitted any engineering plans or received any approval for such work undertaken. This was also a breach of the development order, (again as claimed by the plaintiff).

[20] The defendants then sent their workers to clear the debris and to remove the collapsed retaining wall. The defendants also started work on laying out the gabion wall on the defendants' boundary but failed to lay a base, ie, to remove the clay material and replacing it with hardcore or sand. The defendants also failed to lay a geotextile layer at the back of the gabion wall so that the gabion wall could withstand lateral tensions which would result in movement or the sliding of the wall, and serious bulging at various points and the flow of fine sand and water through the gabion wall whenever it rained would cause instability to the gabion wall, so claims the plaintiff.

[21] The defendants on their own accord also proceeded to not only to reconstruct the retaining wall which was destroyed by the landslides which was about 5 metres in length, but they also went on to extend it across the entire face of the car park of some 20 metres in length allegedly without the plaintiff's consent.

[22] With the regards to the issue of trespass of the gabion wall on a portion of the plaintiff's land, that is no longer an issue as the defendants has conceded the fact of trespass, and the question of damages if any is left to be assessed.

[23] With regards to the plea of nuisance, it must be borne in mind that nuisance as a tort is not actionable per se. The plaintiff would have to prove that there was substantial interference with the use, comfort and enjoyment of the plaintiff land and as a consequence there was physical damage to the land caused by the remaining the defendants. See the case of *Leong Bee & Co v Ling Nam Rubber Works* [1970] 2 MLJ 45 and I quote:

> Lord Atkin had described it as some degree of personal resposibility, in *Sedleigh-Denfield v O'Callaghan* — is almost always necessary, and that generally involves foreseeablility. But this is not to say that foreseeability of injury to a neighbour is an ingredient in the tort. It means only that without proof of a likelihood which the person charged ought reasonably to have appreciated of injury to the neighbour's property foreseeability, it must be remembered, relates to likelihood, not bare possibility — there is, generally speaking, no ground for

A holding him guilty of detracting from the benefits which the neighbour was entitled to have of his property. Thus, as Lord Reid remarked in *Overseas Tankship (UK) Ltd v Miller Steamship Co* at p 640 which was a case of a danger created in navigable waters, in the class of nuisance which includes creating such a danger foreseeability is an essential element in determining liability; not, that is to say, an element in the cause of action, but an element in the proof of responsibility for the creation of a danger that was real and substantial.

[24] In our case, the complaint of the plaintiff was that the activities of the defendants on the adjoining land had caused landslips to occur on the 25 December 2005 (see para 9 statement of claim bundle A) and on the 7 January 2006 (see para 11 statement of claim bundle A). The defendants however as early as June 2005 had commenced development works on its adjoining land. I agree with the submission of counsel for the defendants on this point and I find as a fact there is been no clear evidence to link the landslips on the 7 January 2006 causally to the defendants and the landslips of 25 December 2005 to the defendants. The plaintiff's witnesses could not confirm this and PW3 specifically in his evidence states at p 8 Q and A:

Q: With regards to paragraph 10 & 11 of your witness statement — first you say it was the piling works, now you say it was the earthwork and the equipment which caused the landslide. Apart from your own say so, do you have definitive proof of the cause of the landslide you mentioned?

A: No we do not have any geotechnical engineer to tell us that

Q: With regards to paragraph 13 — you agree you do not have any proof to support your suggest that 'the landslide definitely started from the Defendants land and was caused by the Defendant 'construction activities?

A: Yes I agree

[25] As a general rule, the defendants is entitled to build on its own land although this right is subject to our system of planning controls. The fact the presence of building on the adjoining land and slope does not restrict the defendant's right to build. As Lindley LJ said in the case of *Chastey v Ackland* reported in; [1895] 2 Ch p 398 and I quote:

> speaking generally, apart from long enjoyment, or some grant or agreement, no one has the right to prevent his neighbour from building on his own land, although the consequence may be to diminish or alter the flow of air over it on to land adjoining. So to diminish a flow of air is not actionable as a nuisance.

[26] Lord Hoffman in case of *Hunter and Others and Canary Wharf Ltd* had expressed the view the complaint of the plaintiff would be suitably resolved by using the mechanism of the existing planning system rather than via a court action for nuisance (see also the case of *Bridlington Relay Ltd v Yorkshire*

Electricity Board reported in; [1965] Ch p 436). I refer to decision of House of Lord in the case of *Hunter and others v Canary Wharf Ltd* reported in; [1997] 2 WLR at p 684 and in particular to the judgment of His Lordship Lord Goff of Chieveley particularly at p 689 and I quote:

> As a general rule, a man is entitled to build on his own land, though nowadays this right is inevitably subject to our system of planning controls. Moreover, as a general rule, a man's right to build on his land is not restricted by the fact that the presence of the building may of itself interfere with his neighbour's enjoyment of his land. The building may spoil his neighbour's view (see *Attorney-General v Doughty* (1752) 2 Ves Sen 453 and *Fishmongers' Co v East India Co* (1752) 1 Dick 163); in the absence of an easement, it may restrict the flow of air on to his neighbour's land (*Bland v Mosely* (1587) 9 Co Rep 58a, cited in *Aldred's Case* (1610) 9 Co Rep 57b, and *Chastey v Ackland* [1895] 2 Ch 389); and, again in the absence of an easement, it may take away light from his neighbour's window (*Dalton v Angus* (1881) 6 App Cas 740, per Lord Selborne LC, at pp 794–795, per Lord Blackburn, at p 823): nevertheless his neighbour generally cannot complain of the presence of the building, though this may seriously detract from the enjoyment of his land. As Lindley LJ said in *Chastey v Ackland* (a case concerned with interference with the flow of air), at p 402:
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> > speaking generally, apart from long enjoyment, or some grant or agreement, no one has a right to prevent his neighbour from building on his own land, although the consequence may be to diminish or alter the flow of air over it on to land adjoining. So to diminish a flow of air is not actionable as a nuisance.

and also at p 690 of the report and I quote further:

> In the result I find myself to be In agreement on this point with Pil LJ, who delivered the judgment of the Court of Appeal [1996] 2 WLR 348, when he expressed the opinion, at p 357, that no action lay in private nuisance for interference with television caused by the mere presence of a building. That a building may have such an effect has to be accepted. If a large building is proposed in a neighbouring area, it will usually be open to local people raise the possibility of television interference with the local planning authority at the stage of the appreciated for planning permission.

[27] It is therefore the view of this court, the complaints of the plaintiff would have been best resolved by referring the matter to the appropriate planning authorities.

[28] It must be borne in mind that landslips on the plaintiff's land at taken place well before the defendants commenced the clearing of the land and the slope on it side of the boundary of the said land (see p 36 bundle B a letter from the plaintiff dated 29 November 2005, see also p 65 bundle B ie a letter from DW1 dated 29 december 2005, see the plaintiffs' response at p 38 bundle B letter dated 30 December 2005) Therefore it is the finding of this court that the

landslips complained of by the plaintiff cannot be linked to the activities of the defendants on its land particularly the clearing of the slope as alleged by the plaintiff.

[29] With regards to the plea of negligence, it is quite clear there is insufficient evidence to suggest that the development on the adjoining property was the primary cause for the landslips experienced by the plaintiff on their said land. I find that the defendants had taken all reasonable and prudent steps in carrying out the development on the adjoining property and I do not find they had breached their duty of care to the plaintiff. In fact evidence shows that there were prepared to take reasonable steps to ensure that landslips do not occur in the future. It is to be noted that except for the three landslips, no other incidents of landslips has taken place (see the case of *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* reported at; [2011] 2 MLJ 1 at p 1).

[30] In the backdrop of these landslips, the defendants erected the gabion wall on it side of the land. The plaintiff expressed reservation on the construction of the gabion wall, (see p 40 bundle B a letter dated 16 January 2006). The court observes far from being anxious about a possible calamity the plaintiff were more concerned with extracting a win all proposal for themselves including a new replacement wall at the costs of the defendants. On the 15 February 2006, a meeting was held with DBKL, the plaintiff and the defendants (see pp 44–45 of bundle B). Subsequently after inaction of the part of the plaintiff, and thereafter the plaintiff came back with issues as to the construction of the gabion wall (see pp 98–101 of bundle B). The plaintiff's concern was the gabion wall was poorly constructed and was of poor quality and was bulging and would in all probability collapse. However there was no evidence tendered to show that the gabion wall was not functioning and a site visit by the court showed the gabion wall was in place except for certain area of bulging. These comments came after the gabion wall was constructed.

[31] The court invited the experts of both the plaintiff and the defendants to narrow down the measures that could be taken to strength the gabion wall. The plaintiff's expert then produced a document which the court marked A which set out the areas of agreement in relation to the strengthening of the gabion wall (see the case of *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] 1 Ch 436). The experts are in unanimity in their view that the gabion wall is not in immediate danger of collapse. However having heard the evidence of the experts and studied their reports I am of the view the four remedial measures which both experts had agreed upon namely as set out:

(a) 150mm thick gunite face (Grade 30) with two layers of steel wire mesh BRC DA8 to cover the exposed surface of the gabions;

(b) adequate dowels, eg T12x2m long dowels in 75mm diameter drill hole grouted with Grade 30 cement grout, to be provided in order to hold the reinforced gunite face in place on the gabions;

(c) adequate weep holes, eg 75mm diameter perforated UPVC pipes wrapped with filter fabric, to be provided in the reinforced gunite face in order to allow for subsurface drainage (if any) through the gabion wall; and

(d) surface drain to be provided at the toe of the gabion wall in order to drain the surface runoff and subsurface water (flowing through the weep holes in the reinforced gunite face if any) to the adjacent discharge drain;

is to be undertaken and the costs of such remedial measures should be borne by the plaintiff and the defendants equally. I agree with the submission of counsel for the defendants that the plaintiff cannot be allowed to insist on full proof measures to strengthen the gabion wall without contributing to the costs of undertaking the same. The plaintiff must accept the reality of the adjoining development albeit on a hill slope which may cause a certain amount of interference on the plaintiff's land. Determining the existence of the nuisance requires this court to strike a balance between the right of one party to use his property for his own lawful use and on the other hand, the right of the other party to the undisturbed enjoyment of his property. However in view of the evidence of the experts, the court is of the view a balance can be sustained by ordering the agreed remedial measures as recommended by the experts of both the plaintiff and the defendant alluded to earlier.

[32] With the regard to the issue of the cantilevered structure, the plaintiff seeks according to their pleading in particular paras 18–19 statement of claim and seek in para 31b(i) a removal of all structures found within 5ft of the boundary of the plaintiff's property. It is the defendant's submission that since these properties had been sold to third parties who have not been made parties to this suit, the orders being sought should not be granted. The plaintiff on the other hand submit the defendants knew all along of the plaintiff's complaint and chose to ignore the same and proceed to transfer these properties to third parties. I agree with the submission of the counsel for the defendants that where mandatory orders are being sought, all the relevant parties should be before the court and the plaintiff should have taken steps to ensure that these purchasers were brought in as parties and since they were not on that ground alone, the claim in respect of cantilevered structure should be dismissed.

[33] The court notes the plaintiff seeks a mandatory order to cause the cantilevered structures to be torn down. The order sought is mandatory in nature and the court is not satisfied that on a balance the benefit to the plaintiff (if at all) is not outweighed by the detriment that would be caused to the defendant. I refer to the decision of Singapore High Court in *Tay Tuan Kiat &*

Anor v Pritam Singh Brar reported in; [1987] 1 MLJ 276. Where His Lordship Tian J in his judgment said and I quote at p 279 of the report para F left hand column to para D right hand column:

> In my view, if the mandatory injunction asked for by the plaintiffs is granted obligations imposed on the defendant is extremely onerous and is out of all proportion to the benefit to be gained by the plaintiffs. In my view, it will not produce a fair result. In *Charrington v Simons & Co Ltd* the plaintiff complained that the defendants in breach of negative covenant re-surfaced a tract and raised the level thereof above that of the surrounding land belonging to the plaintiff who was cultivating an orchard on his land. The difference in levels of the track and the surrounding land interfered with or impeded the plaintiff's cultivation on the surrounding land and he brought the action against the defendant seeking, inter alia, a mandatory injunction requiring the defendant to remove any part of the track above the level of the surrounding land. Buckley J who heard the case granted the mandatory injunction but suspending it for three years, which suspension, however, was lifted by the Court of Appeal see [1971] 1 WLR 599. Buckley J in considering the grant of a mandatory injunction said, at p 730:
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> > Where a mandatory order is sought the court must consider whether in the circumstances as they exist after the breach a mandatory order, and if so, what kind of mandatory order, will produce a fair result. In this connection the court must, in my judgment, take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. A plaintiff should not, or course, be deprived of relief to which he is justly entitled merely because it will be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detrimental to the defendant.
>
> The concept of 'fair result' as one of the criteria in determining the grant of a mandatory injunction was accepted by Megarry J. In *Shepherd Homes Ltd v Sandham* [1971] Ch 340 where he said, at p 351:
>
> > Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a 'fair result', and this involves the exercise of a judicial discretion.

[34] It is my view that if I grant such an injunction, a fair result would not be achieved in this case.

[35] As I have mentioned earlier in my judgment, this is a classic case where the plaintiff should have moved the planning authorities to take action against the defendants on the complaint that the cantilevered structures were illegal

and if the plea of the plaintiff fell on deaf ears (which so often happens) the plaintiff could have then moved the court for an order of mandamus to compell the authorities to carry out their duties. The prayers being sought in this case are therefore not appropriate.

[36] In the light of aforesaid and having duly considered the evidence in this case and the submissions of counsel the court makes the following orders ie:

(a) para 31a, b, c, and d of the statement of claim is dismissed with costs, save and except for encl 3 and encl 15 where court awarded costs to the plaintiff in any event;

(b) the court orders in respect of the gabion wall, the following remedial measures to be undertaken by the remaining the defendants under the supervision of Ir Tham Kok Seng and Ir Dr Affendi bin Abdullah at a cost not exceeding RM250,000 as follows:

(i) 150mm thick gunite face (Grade 30) with two layers of steel wire mesh BRC DA8 to cover the exposed surface of the gabions;

(ii) adequate dowels, eg T12x2m long dowels in 75mm diameter drill hole grouted with Grade 30 cement grout, to be provided in order to hold the reinforced gunite face in place on the gabions;

(iii) adequate weep holes, eg 75mm diameter perforated UPVC pipes wrapped with filter fabric, to be provided in the reinforced gunite face in order to allow for subsurface drainage (if any) through the gabion wall;

(iv) surface drain to be provided at the toe of the gabion wall in order to drain the surface runoff and subsurface water (flowing through the weep holes in the reinforced gunite face if any) to the adjacent discharge drain;

(c) the plaintiff is ordered to pay half the costs of these remedial measures with the respect to the gabion wall;

(d) with the regards to the trespass on to the plaintiff's land conceded to by the defendants. The matter is referred to the *timbalan pendaftar* for assessment of damages; and

(e) parties be at liberty to apply.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan